Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-128
	)	
Illinois Public Telecommunications Association, Petition for a Declaratory Ruling Regarding the Remedies Available for Violations of the Commission's Payphone Orders	)	

REPLY COMMENTS OF THE AMERICAN PUBLIC COMMUNICATIONS COUNCIL ON THE ILLINOIS PUBLIC TELECOMMUNICATIONS ASSOCIATION'S PETITION FOR DECLARATORY RULING

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SUMMARY

Contrary to the arguments of the Illinois Commerce Commission ("ICC") and the regional Bell Operating Companies ("RBOCs"), the issues raised by the Illinois Public Telecommunications Association's ("IPTA's") petition are clearly questions of federal law. The FCC directed the Bell Operating Companies ("BOCs") to conform their payphone line tariffs to *federal* requirements, and the primary issues raised by IPTA's petition concern the interpretation of this Commission's rules and orders defining those federal requirements. Conflicting state decisions on these central issues of federal law cry out for resolution by the Commission.

Although the ICC and the RBOCs urge the Commission to defer to the states, the Commission has previously recognized the need to correct erroneous state commission rulings as to the correct interpretation of its payphone orders, including the portions of those orders addressing the new services test requirement. In fact, the Commission has expressly retained jurisdiction to ensure compliance with the new services test and has expressly exercised its jurisdiction to require the BOCs to refund charges that exceed new-services-test-compliant levels.

A ruling by this Commission is also necessary to correct BOC abuse of the Commission's waiver process. In 1997, in order to obtain a waiver of their failure to comply with the new services test so that they could begin collecting dial-around compensation, the BOCs (1) acknowledged that the Commission's orders required their intrastate payphone line rates were subject to the new services test; (2) promised to bring their payphone service rates into compliance with the new services test; (3) acknowledged the need to comply with the new services test as a condition of their eligibility for dial-around compensation ; and (4) waived any claim that the filed rate

doctrine bars the grant of refunds for charges in excess of new-services-test-compliant levels. Since then, the BOCs have reneged on every one of those representations. By issuing a ruling clarifying the refund requirement, the Commission will demonstrate that it holds carriers to the promises they make to the Commission in return for regulatory benefits.

Contrary to the BOCs' and ICC's arguments, the Commission's prior orders make it crystal clear that compliance with the new services test is a condition precedent to the BOCs' eligibility to receive dial-around compensation, and the BOCs' ineligibility when they violated that requirement is highly relevant to the question of the payphone service providers' entitlement to refunds. There are two alternative ways to address the BOCs' ineligibility: (1) prohibit the BOC from collecting dial-around compensation until it complies (and require the BOC to refund any compensation already collected), or (2) allow the BOC to collect dial-around compensation but require the BOC to refund the excess payphone line charges collected. In its 1997 order granting a limited waiver of the eligibility requirement, the Commission recognized that the latter remedy was preferable, and ordered it.

Although the RBOCs claim they did not always "rely" on the waiver, they themselves, in requesting a waiver, stated that *where new or revised tariffs are required* in order to comply with the new services test, they would provide a refund back to April 15, 1997. The BOCs have relied on the waiver in any case where new or revised tariffs were required, since otherwise they would have to be declared ineligible for compensation and would be required to disgorge all of the compensation they collected prior to bringing their rates into compliance.

The RBOCs' prior express waiver of filed-rate-doctrine claims renders irrelevant their current filed-rate-doctrine arguments. Even if the argument had not been waived, however, the FCC's orders preempt any state-law determinations that refunds of charges are barred based on either the filed rate doctrine or "retroactive ratemaking" arguments.

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REPLY COMMENTS OF THE AMERICAN PUBLIC COMMUNICATIONS COUNCIL ON THE ILLINOIS PUBLIC TELECOMMUNICATIONS ASSOCIATION'S PETITION FOR DECLARATORY RULING

The American Public Communications Council ("APCC") hereby replies to comments on the Illinois Public Telecommunications Association's ("IPTA's") request for a declaratory ruling that payphone service providers ("PSPs") generally and IPTA members in particular are entitled to refunds, back to April 15, 1997, of charges assessed by incumbent local exchange carriers ("ILECs")[1] for local exchange services used by

[1] APCC's reply comments address the refund requirement as applied to the Bell Operating Companies ("BOCs"). As noted in APCC's comments, APCC also agrees with IPTA's argument that non-BOC ILECs are also required to provide refunds. APCC Comments at 1.

PSPs, to the extent that such charges exceed those that would have been collected had the rates complied with the FCC's new services test standard.

I. THE NEED FOR A RULING IS CLEAR DESPITE THE BOCs' ATTEMPT TO KEEP THE ISSUES FROM BEING DECIDED BY THIS COMMISSION

A. The Issues Raised By IPTA's Petition Are Matters Of Federal Law

Contrary to the arguments of the Illinois Commerce Commission ("ICC") and the regional BOCs ("RBOCs"), the issues raised by IPTA's petition are clearly questions of federal law. The ICC contends that, because the payphone line rates at the heart of these disputes were filed in state tariffs, the issues raised by IPTA must be governed by state law. ICC Comments at 7. In making this argument, the ICC simply disregards that, even though the FCC delegated the actual review of tariffs to the states, the FCC directed the BOCs to conform their payphone line tariffs to *federal* rules and standards. Thus, as explained in APCC's comments and amplified below, the primary issues raised by IPTA's petition concern the interpretation of this Commission's rules and orders. Specifically, those issues are:

> 1. Whether the Commission meant what it said in its prior orders[2] when it ruled that BOCs' "effective intrastate

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[2] *See Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Dkt. No. 96-128, Report and Order, 11 FCC Rcd 20541 (1996) ("*First Payphone Order*"), *recon.* 11 FCC Rcd 21233, ¶¶ 131, 162-63 (1996) ("*First Payphone Reconsideration Order*"), *aff'd in relevant part, Ill. Pub. Telecomms. Ass'n v. FCC*, 117 F.3d 555 (D.C. Cir. 1997), *cert denied, Virginia State Corp. Comm'n v. FCC*, 523 U.S. 1046 (1998); Order, 12 FCC Rcd 20997, ¶¶2, 30-31, 35 (Com. Car. Bur. 1997)("*First*

tariffs for payphone services [must] be in compliance with federal guidelines, specifically that the tariffs [must] comply with the 'new services' test," and that BOCs "must comply with this requirement, among others, before they are eligible to receive" dial-around compensation (*id.*, ¶1);

2. Whether the Commission meant what it said when it ruled, in the *Second Waiver Order*, that, as a condition of granting a limited waiver of the new services test eligibility condition, the BOCs must keep their promise to "reimburse its customers or provide credit, from April 15, 1997" (*id.*, ¶¶2, 20, 25) for excess payphone line charges if "new or revised tariffs are required"[3] in order to comply with the new services test, and if the rates, when effective, are lower than existing payphone line rates; and

3. Whether a state commission's prior approval of a payphone line tariff under state law prevents the award of reparations, pursuant to a FCC order, for a violation of FCC rules.

B. The Federal Law Issues Raised By IPTA Must Be Resolved By The FCC

Contrary to the RBOCs' and ICC's arguments, there are compelling reasons why the FCC must step in to resolve the issues raised by IPTA concerning interpretation and implementation of the FCC's orders. Although the RBOCs and ICC argue that idiosyncrasies in the Illinois proceeding make it an inappropriate subject of a declaratory ruling (RBOC Comments at 8-10; ICC Comments at 15-17), the comments

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(Footnote continued)
Waiver Order"); Order, 12 FCC Rcd 21370, ¶1 (Com. Car. Bur. 1997) ("*Second Waiver Order*").

[3] Letter from Michael K. Kellogg to Mary Beth Richards, April 11, 1997, at 1 ("*Second Kellogg Letter*") (attached as Attachment 2 to APCC Comments).

filed by other payphone associations make clear that there are numerous conflicting state decisions on the central legal issues that cry out for resolution by this Commission.[4] Whatever the individual differences in circumstances of each state proceeding, they share the common legal issues concerning the meaning of FCC's orders and the appropriate remedies for non-compliance with those orders. On these common issues concerning the correct interpretation of FCC orders, only the FCC can provide a definitive ruling.

The RBOCs also argue that "principles of comity and collateral estoppel counsel the Commission to reject IPTA's petition." RBOC Comments at 7. They point out that the Commission previously ruled that it would rely on the states to ensure that basic payphone lines are tariffed in accordance with federal requirements, and would only take on that role if the state was unable to perform it. *Id.* at 12-13. The Commission, however, has not deferred to erroneous state commission rulings as to the federal law governing these determinations.[5]

The FCC also did not rule that it would defer to the states to determine whether the BOCs have satisfied the conditions of eligibility to receive dial-around

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[4] *See, e.g.*, Independent Payphone Association of New York, Inc. Comments; Payphone Association of Ohio Comments; New England Public Communications Council, Inc. Comments.

[5] *See Wisconsin Public Service Commission, Order Directing Filings*, Memorandum Opinion and Order, 17 FCC Rcd 2051 (2002) ("*Wisconsin Order*"), *aff'd New England Pub. Comms. Council v. FCC*, 334 F.3d 69 (D.C. Cir. 2003), *cert denied*, 124 U.S. 2065 (2004); *North Carolina Payphone Association*, Order, CCB/CPD No. 99-27 *et al.*, DA 02-516, ¶3 (Com. Car. Bur., rel. March 5, 2002)(granting payphone association petitions and finding that North Carolina and Michigan public service commissions "should re-evaluate their respective decisions concerning the pricing of BOCs' intrastate payphone line rates and overhead ratios to ensure compliance with the *Wisconsin Order*").

compensation. Indeed, as the ICC acknowledges (ICC Comments at 18), the Commission "delegate[d] authority to the Chief, Common Carrier Bureau, to make any necessary determination as to whether a LEC has complied with all requirements as set forth above." *First Payphone Reconsideration Order*, ¶132. *See also Second Waiver Order*, ¶19, n. 60 ("The Commission retains jurisdiction . . . to ensure that all requirements . . . including intrastate tariffing of payphone services, have been met").

The ICC seems to argue that, because the FCC's *First Waiver Order* states that LEC compliance with the conditions of eligibility for compensation "is to be considered on a state-by-state basis," the Commission necessarily must defer to state commissions' determinations of those issues. *First Waiver Order*, ¶12, *quoted in* ICC Comments at 7. But, as the context makes clear, the Commission was only saying that the *facts* bearing on a LEC's eligibility to receive federal compensation may vary from state to state, *not* the applicable law. As the Commission went on to state in the same paragraph of that order, "If a LEC has effective intrastate tariffs in State X and has filed tariffs in State Y that are not yet in effect, then the LEC PSP will be able to receive payphone compensation for its payphones in State X but not in State Y." *Id.* Nothing in this paragraph suggests that the *legal* content of the federal eligibility requirements, or the type of remedies used to enforce those requirements, varies from state to state.

Similarly, the Commission did not rule that it would defer to state determinations as to whether to grant refunds when the BOCs are found to have failed to comply with the new services test. Rather, the Commission specifically addressed that issue in the *Second Waiver Order*, stating that a BOC "must reimburse its customers or provide credit from April 15, 1997 in situations where the newly tariffed rates, when effective, are lower than the existing tariffed rates." *Second Waiver Order*, ¶2.

C. The Commission Must Issue A Declaratory Ruling In Order To Preserve The Integrity Of Its Processes

Moreover, there is an even stronger reason for the FCC to address IPTA's issues directly. The BOCs have thoroughly abused the Commission's waiver process by making a series of representations in the *First Kellogg Letter*[6] and *Second Kellogg Letter* in order to obtain a badly needed waiver, and then blatantly reneging on virtually every one of those representations.

First, the BOCs acknowledged that the Commission's orders required their intrastate payphone line rates to comply with the new services test. *First Kellogg Letter* at 1 ("none of us understood the payphone orders to require existing, previously-tariffed intrastate payphone services, such as the COCOT line, to meet the Commission's 'new services' test . . . . It was not until the Bureau issued [*the First Waiver Order]* that we learned otherwise"). Three years later, the BOCs denied that the FCC even had jurisdiction to require intrastate payphone service rates to comply. *Wisconsin Order*, ¶ 31 & n.74 (2002).

Second, the BOCs said they would bring their payphone service rates into compliance with the new services test. *First Kellogg Letter* at 2. In fact, as the comments of state payphone associations attest, the BOCs have resisted compliance with the new services test every step of the way, and in a number of states they still have yet to comply. *See, e.g.*, IPANY Comments.

Third, in requesting a waiver from the Commission, the BOCs acknowledged the need to comply with the new services test as a condition of their eligibility for dial-

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[6] *See* Letter from Michael K. Kellogg to Mary Beth Richards, April 10, 1997 (attached as Attachment 1 to APCC's Comments) ("*First Kellogg Letter*").

around compensation. *First Kellogg Letter* at 2 ("Provided, however, that we undertake and follow-through on our commitment to ensure that existing tariff rates comply with the "new services" test and, in those States and for those services where the tariff rates do not comply, to file new tariff rates that will comply, we believe that we should be eligible for per call compensation starting on April 15th"). Now the BOCs claim there is no such eligibility condition. RBOC Comments at 18-20.

Fourth, in requesting a waiver from the Commission, the BOCs expressly waived any defense to granting refunds based on the filed rate doctrine. *First Kellogg Letter* at 2. Now the BOCs are shamelessly asserting that very defense. RBOC Comments at 15-17.

As APCC explained in its comments, the Commission must issue the requested ruling to protect the integrity of its processes. It would make a mockery of the Commission's *Second Waiver Order* if the Commission allows the BOCs to succeed in their brazen attempt to have it both ways – to retain both the dial-around compensation they have collected pursuant to the *Second Waiver Order and* the excessive payphone line charges they have collected from PSPs for years in violation of the *Payphone Orders*. Allowing the BOCs to keep the excess charges they have collected would reward them for their persistent refusal to comply with the Commission's *Payphone Orders* and would undermine the integrity of the Commission's processes by demonstrating that promises made to the Commission in return for regulatory benefits need not be kept.

II. THE COMMISSION MUST RULE THAT BOCS WHO FAILED TO COMPLY WITH THE NEW SERVICES TEST MUST REFUND EXCESS LINE CHARGES BACK TO APRIL 15, 1997

A. The BOCs Were Required To Comply With The New Services Test As A Condition Of Being Eligible To Collect Dial-Around Compensation Beginning April 15, 1997

As noted, despite having previously acknowledged that new services test compliance is a condition of their eligibility for dial-around compensation, and despite having promised to comply with the test in order to obtain a waiver of that very condition and to begin collecting millions of compensation dollars, the BOCs now brazenly claim that NST compliance is *not* a condition of eligibility for compensation.

According to the BOCs, the *First Waiver Order* and *Second Waiver Order* are ambiguous on this point. RBOC Comments at 20, n. 12. The BOCs' current position is internally incoherent: They would not have needed a waiver of the new-services-test eligibility condition if there was no such eligibility condition. But apart from that, the orders are anything but ambiguous. They are crystal clear:

> We emphasize that LECs must have effective state tariffs that comply with the requirements set forth in the Order on Reconsideration. These requirements are: (1) that payphone services state tariffs must be cost-based, consistent with Section 276, nondiscriminatory; and consistent with Computer III tariffing guidelines; and (2) that payphone costs for unregulated equipment and subsidies be removed from the intrastate local exchange service and exchange access service rates. LEC intrastate tariffs must comply with these requirements by April 15, 1997 for the payphone operations of LECs to receive payphone compensation. As discussed above, for LECs that have not complied with these requirements, their payphone operations will not be entitled to compensation pursuant to the Payphone Reclassification Proceeding, in the states in which they do not comply.

First Waiver Order, ¶35.

> In this Order, the Common Carrier Bureau ("Bureau") grants a limited waiver of the Commission's requirement that effective intrastate tariffs for payphone services be in compliance with federal guidelines, specifically that the tariffs comply with the "new services" test, as set forth in the Payphone Reclassification Proceeding, CC Docket No. 96-128. Local exchange carriers ("LECs") must comply with this requirement, among others, before they are eligible to receive the compensation from interexchange carriers ("IXCs") that is mandated in that proceeding.

Second Waiver Order, ¶1. The RBOCs' arguments amount to nothing more than a seven-years-late plea for reconsideration of the *First Payphone Reconsideration Order*, the *First Waiver Order*, and the *Second Waiver Order*.[7]

The RBOCs also contend that the Commission could not have required new services test compliance as a condition of eligibility because the state proceedings to determine such eligibility "may take years." RBOC Comments at 20. Of course, the Commission recognized this very possibility. The potential for delay is one of the reasons why the Commission issued the *Second Waiver Order* – to make sure that new services test proceedings did not "unduly delay, and possibly undermine" the transition to the new compensation regime. *Id.*, ¶21. It is also why the Commission

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[7] The RBOCs further argue that the Commission "radically modified the requirements of the test." That is not the case. The Commission clarified requirements that already existed, but that the RBOCs refused to acknowledge. *See Wisconsin Order*, ¶¶ 43 ("the Commission's longstanding precedent shows that we have used forward-looking cost methodologies where we have applied the new services test"), ¶¶51-58 (approving overhead loading methodologies that are "consistent with our precedent regarding overhead assignments to new services provided to competitors"); ¶¶62-65 (rejecting RBOCs' interpretation of the 1996 payphone orders as excluding usage rates from application of the new services test). *See also Request to Update Default Compensation Rate for Dial-Around Calls from Payphones*, Report and Order, WC Dkt. No. 03-225, FCC 04-182, ¶ 20 (rel. August 12, 2004)(in *Wisconsin Public Service Commission* proceeding, "the Common Carrier Bureau issued guidance *clarifying* application of the new services test" (emphasis added)).

stated, in that order, that state commissions "must act on the tariffs . . . within a reasonable period of time" and that "[t[he Commission retains jurisdiction under Section 276 to ensure that all requirements . . .. have been met." *Id.*, ¶19 n. 60. Through their massive resistance to application of the test, the BOCs have managed to turn the possibility of undue delay into a glaring reality, making it more critical than ever for the Commission to ensure that the refunds required by its prior orders are awarded.

B. The Appropriate Remedy For The BOCs' Failure To Comply With The New Services Test Is To Require The BOCs To Refund Excess Line Charges Back To April 15, 1997

1. Refunds Of Excess Payphone Line Charges Are The Appropriate Remedy Under Federal Law For The BOCs' Violations Of The New Services Test Requirement

The ICC contends that the issue of whether a BOC who fails to comply with the new services test is ineligible to receive dial-around compensation is "irrelevant to the question of refunds." ICC Comments at 20. As a variant of this argument, the RBOCs contend that PSPs lack standing to seek a ruling on the question of eligibility. RBOC Comments at 17-18.[8]

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[8] The RBOCs, however, acknowledge that the FCC has discretion to issue a declaratory ruling even when the petitioner lacks standing. RBOC Comments at 17, n. 10. Thus, even if the petitioner did lack standing, the FCC should exercise its discretion to issue a ruling in order to maintain the integrity of its processes, resolve inconsistent state interpretations of FCC orders, and put an end to the frustration of the Section 276 mandate. *See* above. Moreover, there is no merit to the BOCs' equitable arguments that this Commission should decline to issue a ruling because the IPTA petition is filed for an "improper purpose" *Id.* at 18. There is nothing "improper" in trying to seek refunds for excessive payphone line charges.

It is equally incorrect that a declaratory ruling is inconsistent with the "established" procedure for adjusticating BOC eligibility for dial-around compensation.

The relevance of the eligibility issue, however, is clear. Where a BOC is ineligible to collect dial-around compensation due to non-compliance with the new services test, there are two alternative ways to address the violation: (1) prohibit the BOC from collecting dial-around compensation until it complies (and require the BOC to refund any compensation already collected), or (2) allow the BOC to collect dial-around compensation but require the BOC to refund the excess payphone line charges collected – thereby establishing "nunc pro tunc" eligibility for dial-around compensation as of the April 15, 1997 effective date. In the *Second Waiver Order*, the Commission recognized that the latter remedy was preferable, and ordered it.

Thus, the issue of the BOCs' eligibility to collect dial-around compensation is clearly relevant to whether PSPs are entitled to refunds, and the PSPs clearly have standing to raise the argument since they are injured by the denial of refunds.

Therefore, in order to remedy the violations of the new services test requirement committed by SBC and other BOCs, it is entirely appropriate and legally necessary to require those carriers to refund the charges they collected from PSPs in excess of new-services-test compliant rates.

(Footnote continued)
Id. and is inconsistent with the "established" procedure. In *Bell Atlantic-Delaware v. Frontier Communications Servs., Inc.*, Memorandum Opinion and Order, 14 FCC Rcd 16050 (1999)("*Bell Atlantic Order*"), on which the RBOCs rely, the Commission said it had "established specific procedures" to "resolve dispute ANIs," *not* to resolve disputed BOC eligibility for compensation. *Id.* at 16068, ¶27. The *only* procedure that the Commission ruled out for the latter purpose was self-help by the *carriers*. Nothing in the *Bell Atlantic Order* limited the *Commission's* ability to address eligibility issues by way of a declaratory ruling.

2. The BOCs Cannot Avoid Payment Of Refunds By Claiming They Did Not Rely On The Waiver

The RBOCs' only comment on the waiver issue is to state that SBC Illinois "did not rely" on the waiver. In its comments, APCC detailed exactly why SBC Illinois and similarly situated BOCs cannot possibly claim that they did not rely on the waiver. APCC Comments at 14-17. The BOCs themselves, in requesting a waiver, stated that "*where new or revised tariffs are required* and the new tariff rates are lower than the existing ones," they would provide a refund back to April 15, 1997. Second Kellogg Letter at 1 (emphasis added). Clearly, the BOCs and the Commission intended that a BOC would "rely" on the waiver in any case where new or revised tariffs were required, whether or not the tariff revision was filed by the BOC on its own or in response to a state commission ruling. Otherwise, the BOC would have to be declared ineligible for compensation and would be required to disgorge all of the compensation it had collected prior to bringing its rates into compliance.

C. The BOCs' Filed-Rate-Doctrine Claim, Even If It Had Not Been Waived, Has No Merit

In their letters requesting a waiver, the RBOCs expressly waived any filed-rate-doctrine claim. *First Kellogg Letter* at 2. This renders irrelevant the filed-rate-doctrine arguments of the ICC (ICC Comments at 7-10) and the RBOCs (RBOC Comments at 15-17). Even if the argument had not been waived, however, refunds of excess payphone line charges do not violate the filed rate doctrine or the related restrictions on retroactive ratemaking. As we explained in APCC's comments, the filed rate doctrine exists to prevent carriers from *discriminating* among their customers by charging certain preferred customers special rates that differ from the "legal" tariffed rate; it cannot

prevent a regulatory agency from granting *nondiscriminatory* refunds of unlawful charges to all affected customers. *Id.*

Moreover, as explained by the Northwest Public Communications Council *et al.* ("NPCC"), any state-law determination that refunds of charges are barred by the filed rate doctrine is inconsistent with federal law and is preempted under 47 U.S.C. §276(c). NPCC Comments at 3, citing *First Payphone Order*, ¶147, and *Wisconsin Order*, ¶ 38. In addition, state denials of refunds based on the filed rate doctrine are preempted by the *Second Waiver Order*, which expressly requires payment of refunds.

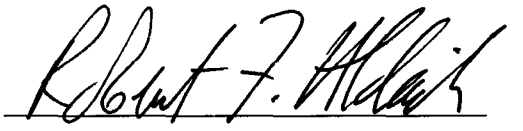
State-law arguments based on "retroactive ratemaking," a variant of the filed rate doctrine, are similarly waived and preempted. Moreover, as NPPC explains, refunds can be awarded consistently with *Arizona Grocery Co. v. Atchison, Topeka & Sante Fe Rwy. Co.*, 284 U.S. 370 (1932). Nothing in *Arizona Grocery* precludes rates that were approved under state law from being refunded if they violate federal law. NPPC Comments at 3-4.

CONCLUSION

For the foregoing reasons, the Commission should grant IPTA's petition for a declaratory ruling and rule that BOCs must provide refunds back to April 15, 1997 for all payphone line charges collected from PSPs in excess of new-services-test-compliant rates.

Dated: September 7, 2004

Respectfully submitted,



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I hereby certify that, on September 7, 2004 , a copy of the foregoing Reply Comments of The American Public Communications Council, was served by electronic mail or U. S. Mail, on the following parties as indicated below:

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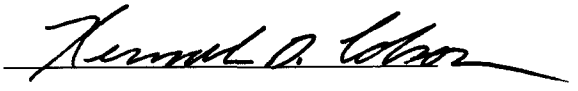

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